No. 59.

Petition for Rehearing.

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Petition for Rehearing.

Rec'd May 12, 1902.

In the Supreme Court

of the United States.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

No. ~~875~~ 59.

In Error to the Supreme Court of the State of Kansas.

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In the Supreme Court
of the United States.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.
} No. 275.

In Error to the Supreme Court of the State of Kansas.

Petition for Rehearing.

HAVING carefully examined the opinion of the Honorable Court, we think that, with propriety, we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellee on the ground:

That the question as to whether or not attorney's fees should be allowed by a State court as a measure of damages on an injunction bond given in a Federal court, is not one arising under an "authority exercised under the United States"; that it is a question of general law upon which the decision of a State court is final and not reviewable by this court.

It is unnecessary to repeat the facts, as they sufficiently appear in the opinion of the court as well as in the dissenting opinion of Mr. Justice HARLAN.

According to the opinion of the court, "a bond given for an injunction in an equity cause in a court of the United States is to be construed with reference to the liability administered in the courts of the United States on that subject as settled by this court." Again: "For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law."

It will be borne in mind that the jurisdiction of the State court was not brought in question, nor the validity of the bond, nor the order under which the bond was taken. Neither was there any ambiguity as to the meaning of the bond. The only question arising in connection with the bond is as to the measure of damages which should be allowed upon its breach.

As there is no act of Congress regulating the measure of damages on an injunction bond, as there was no rule of court in existence upon the subject, and as the bond itself made no provision as to the measure of damages, it follows that the point involved is one of general law, and if it is impressed with a Federal character it grows out of the fact that the bond was taken in a Circuit Court of the United States.

The position taken by the court is, therefore, substan-

tially this: That it has the power to review the decision of a State court upon the measure of damages to be allowed upon an injunction bond, given in a Federal court, even though it be conceded that the precise question involved is one of general law, upon the sole ground that the bond was taken in pursuance of an order made by a Federal court.

If this is true, it necessarily follows that this court can review *all* questions decided by a State court in connection with an injunction bond given in a Federal court, whether those questions, in themselves, present a Federal question or not.

If an appeal lies from the State court upon all questions arising in connection with an injunction bond, it ought to lie as to all questions arising in connection with suits involving the bonds of receivers appointed by United States courts, in connection with judgments rendered by such courts, in connection with the bonds of United States marshals or other Federal office-holders, in connection with all suits brought in the State courts by or against a Federal corporation, in connection with all cases in the State courts in which the parties claim under an act of Congress or a patent issued by the United States.

A judgment of a Federal court is certainly as much of an "authority exercised under the United States" as is an injunction bond. Yet this court has held time and again that all questions arising under such a judgment do not necessarily involve a Federal question which is subject to

review on a writ of error from this court to a State court. See —

Prov. Sav. Society v. Ford, 114 U. S. 635.
Carson v. Dunham, 121 U. S. 421, 428.
Metcalf v. Watertown, 128 U. S. 586.
Pope v. Louisville &c. Ry., 173 U. S. 573, 580.
Gableman v. Peoria &c. Ry., 179 U. S. 335, 340.

In the case of *Provident Savings Bank v. Ford, supra,* the court uses this language:

"What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, *unless some question is raised in the case* (as might be raised in any of the cases specified), *distinctly involving the laws of the United States* — such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States."

In the case of *Metcalf v. Watertown,* 128 U. S. 588, the views of the court upon this subject are thus expressed:

"Nor can the jurisdiction of the Circuit Court be maintained upon the theory that this suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit of that character; for the plaintiff, without raising by his complaint *any distinct question of a Federal nature,* and without indicating, by proper averment, how the determination of any question of that character is involved in the case, seeks to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due from the city of Watertown."

We also quote from the opinion of this court in the case of *Gableman v. Peoria &c. Ry. Co.,* 179 U. S. 340:

"The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of the opinion that this question must be answered in the negative, and that this has been heretofore so determined as the Circuit Court of Appeals properly held in this case."

In the case at bar we claim that the allowance of attorneys' fees as an element of damage does not present "any distinct question of a Federal nature"; that it is essen-

tially a question of general law; that the jurisdiction to review this question must necessarily be based upon the proposition that all questions, even though they do not present in themselves a distinct Federal question, passed upon by a State court and arising in connection with an injunction bond given in a Federal court, are reviewable in this court; and that this view of the law is contrary to reason and authority.

A Federal corporation can remove a case to a Circuit Court of the United States on the sole ground of its character as a corporation created by the United States. This is upon the theory that in the course of the litigation some question may arise involving the construction of the act of Congress creating the corporation. But suppose a railroad company created by an act of Congress is sued in the State court for personal injuries; a judgment is recovered against it which is affirmed by the Supreme Court of the State; an effort is thereupon made to have this court review the rulings of the State court in regard to what constitutes negligence and contributory negligence and the proper measure of damages. Would this court sit in judgment upon rulings of this nature made by the State court, even though the railroad company was, at the time of inflicting the injuries complained of, acting and existing under the authority of an act of Congress? We submit that this would not be done, and that the reason therefor would be that the questions presented for review were ques-

tions of general law, pure and simple, and that the conclusions of the State court with respect to them were final, notwithstanding the fact that they were made in a case against a Federal corporation.

Neither will this court review the decision of a State court in a case in which the United States is a party or interested, unless the precise question presented for consideration is one arising under the Constitution or laws of the United States. It would not review a question of general law even in such a case. This is decided in *United States v. Thompson, et al.*, 93 U. S. 586.

In the case of *Avery v. Popper*, 179 U. S. 305, this court said:

"With respect to writs of error from this court to judgments of State courts, in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and those proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented — in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of Rev. Stat., § 709."

Again:

"This was a question either of local law or of general law. If of local law, of course the decision of the Supreme Court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that, if the question had arisen on appeal from a Circuit Court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court, whose opinion upon a question of general law is not reviewable here."

In *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, it was held that the judgment of the Supreme Court of a State could not be reviewed simply because the case involved a contest between rival claimants of a mine under certain sections of the Revised Statutes. To the same effect are *Florida Central & Peninsular Railroad Co. v. Bell*, 176 U. S. 321; *DeLamar's Mining Co. v. Nesbitt*, 177 U. S. 523; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505.

For cases in which this court has held that it will not review the decisions of State courts on questions of general law, see —

Bethel v. Demaret, 10 Wall. 537.
Delmas v. Insurance Co., 14 Wall. 666.
Rockhold v. Rockhold, 92 U. S. 130.

It is also plain that under the decision of the court in the case at bar it will be necessary for the Federal courts to allow attorneys' fees as damages in suits brought on in-

junction bonds given in the State of Kansas. This would be upon the theory that the bond is to be "interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority."

If this is to be the law with respect to injunction bonds, why is it not equally applicable to ordinary contracts? The principle involved is precisely the same. Yet in the case of *Myrick v. Railroad Co.*, 107 U. S. 102, this court refused to be governed by the decisions of a State court on a matter of general law which under the principles enunciated in the case at bar would have controlled the rights of the parties. We take an extract from the opinion in that case:

"Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 88; *Illinois Central Railroad Co. v. Johnson*, 34 id. 389.

"Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a State court must control. It is a matter of general law, upon which this court will exercise its own judgment. *Chicago City v. Robbins*, 2 Black, 418; *Railroad Company v. National Bank*, 102 U. S. 14; *Hough v. Railway Company*, 100 id. 213."

See also *Swift v. Tyson*, 16 Pet. 1.
B. & O. Rld. Co. v. Baugh, 149 U. S. 368.

We submit that the injunction bond in question was nothing more nor less than a contract, which was to be construed in accordance with the rules of the common law which prevailed in the State where executed and to be performed, and that in the determination of questions of common law, or general law, arising in connection with the bond, the decision of the State court is final. We submit that the same liberty of action should be accorded to State courts, on all questions of general law, as is exercised by the courts of the United States.

We take the liberty of giving an excerpt from the dissenting opinion of Mr. Justice HARLAN:

"Let it be observed that the jurisdiction of the State court, as between the parties and as to the subject-matter, is not disputed. The question before it was as to the extent of the liability of the sureties in the injunction bond. The decision of that question did not depend, in any degree, upon the Constitution or statutes of the United States. It depended entirely upon the meaning of the words of the bond, and the principles of law applicable to such an instrument. It was manifestly, therefore, a question of general law as distinguished from Federal law. Upon such a question the State court was entitled to give effect to its own views. The question could not become a question of Federal law by reason alone of the fact that the bond was executed under the authority of the Circuit Court; for, as already said, neither the *order* under which the bond was taken, the validity of the bond, nor the authority of the court was disputed. Nor could it become a Federal question because of any decision by this court in cases theretofore decided between other parties. Suppose this

court had not, prior to the trial of this case, expressed any opinion upon that question of general law. Could it then have been contended that the judgment complained of denied any Federal immunity? If not, then the Federal immunity now claimed arises entirely from the failure of the State court to take the same view of a question of general law which this court took in prior cases between other parties. There has been a wide difference of opinion between this court and some of the State courts upon certain questions of general law. But it has never been supposed that any one has such a vested interest in the views of this court upon questions of general law that he may complain of the refusal of a State court to accept those views as denying him an 'immunity' existing or belonging to him, in virtue of an 'authority exercised under the United States.' In *Winona & St. Peter Railroad v. Plainview*, 143 U. S. 371, 390, which came to this court from the highest court of Minnesota, it was said: 'The fact that the Supreme Court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the Circuit Court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guarantees to a suitor that the same rule of law shall be applied to him by a State court which would be applied if his citizenship were such that his suit might be brought in a Federal court.'

"Or, suppose two actions were brought in the Federal court (there being diversity of citizenship in each case), one on an injunction bond executed in a Circuit Court of the United States, and the other upon a like bond executed in a State court. What would be the ruling as to the measure of damages? Would the court disallow counsel fees in the first case and allow them in the second case, where the highest court of the State had established the

principle that counsel fees could be recovered? Each branch of the latter question must, upon the principles of the opinion just delivered, be answered in the affirmative. But they cannot be so answered without placing the decisions of the courts upon a question of general law, on the same basis as a legislative enactment prescribing the measure of damages in suits on injunction bonds."

Wherefore, upon the foregoing grounds, this appellee and petitioner respectfully prays this Honorable Court to grant to it a rehearing of said cause.

A. L. Williams & N. H. Loomis

Attorneys for Joab Mulvane, Petitioner.

I, N. H. Loomis, of counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well-founded, and that the same is not interposed for delay.

N. H. Loomis.